

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VICTORIA P. MAGANA, an
individual,

Plaintiff,

v.

WELLS FARGO BANK, N.A.; LSI TITLE
COMPANY, a California
Corporation; and NDEX WEST LLC, a
Delaware limited liability
corporation,

Defendants.

No. C 11-03993 CW

ORDER GRANTING
PRELIMINARY
INJUNCTION AND
ORDERING PAYMENT
OF BOND

On August 29, 2011, pursuant to the ex parte application of Plaintiff Victoria P. Magana, the Court entered a temporary restraining order (TRO) against Defendants Wells Fargo Bank, N.A., and NDEX West LLC,¹ preventing Defendants from proceeding with a trustee's sale of property located at 1113 Remington Court in Sunnyvale, California. Plaintiff now seeks a preliminary injunction against Defendants. Defendants oppose the motion. The motion was heard on October 6, 2011. Having considered oral arguments and the papers submitted by the parties, the Court GRANTS Plaintiff's motion, on the condition that she posts a bond.

BACKGROUND

In March 2007, Plaintiff obtained a mortgage loan from Defendants secured by a deed of trust against her real property at

¹ Plaintiff has voluntarily dismissed her claims against Defendant LSI Title Company. (Docket No. 14.)

1 1113 Remington Court in Sunnyvale, California. Defendants'
2 records state that Plaintiff stopped making mortgage payments in
3 the spring of 2009. On May 26, 2010, Defendants recorded a Notice
4 of Default on the property. On August 27, 2010, Defendants
5 recorded a Notice of Trustee's Sale. A non-judicial foreclosure
6 sale was subsequently scheduled for July 8, 2011. Plaintiff filed
7 a verified complaint in state court on July 7, 2011, the day
8 before the scheduled foreclosure sale. On July 8, 2011, the state
9 court issued a TRO postponing the trustee's sale until August 25,
10 2011. Defendant Wells Fargo filed a notice of removal to federal
11 court on August 12, 2011.

12 LEGAL STANDARD

13 "A plaintiff seeking a preliminary injunction must establish
14 that he is likely to succeed on the merits, that he is likely to
15 suffer irreparable harm in the absence of preliminary relief, that
16 the balance of equities tips in his favor, and that an injunction
17 is in the public interest." Winter v. Natural Res. Def. Council,
18 Inc., 129 S. Ct. 365, 374 (2008).

19 Alternatively, "a preliminary injunction could issue where
20 the likelihood of success is such that serious questions going to
21 the merits were raised and the balance of hardships tips sharply
22 in plaintiff's favor," so long as the plaintiff demonstrates
23 irreparable harm and shows that the injunction is in the public
24 interest. Alliance for the Wild Rockies v. Cottrell, 632 F.3d
25 1127, 1131 (9th Cir. 2011) (citation and internal quotation and
26 editing marks omitted). A court employs a sliding scale when
27 considering a plaintiff's showing as to the likelihood of success
28 on the merits and the likelihood of irreparable harm. Id. "Under

1 this approach, the elements of the preliminary injunction test are
2 balanced, so that a stronger showing of one element may offset a
3 weaker showing of another." Id.

4 DISCUSSION

5 California Civil Code section 2923.5 "concerns the crucial
6 first step in the foreclosure process: The recording of a notice
7 of default as required by section 2924." Mabry v. Superior Court,
8 185 Cal. App. 4th 208, 221 (2010). Under section 2923.5, a lender
9 may not file a notice of default until thirty days after it has
10 contacted "the borrower by phone or in person to 'assess the
11 borrower's financial situation and explore options for the
12 borrower to avoid foreclosure.'"² Id. (quoting Cal. Civ. Code
13 § 2923.5(a)(2)). During this conversation, the lender must advise
14 the borrower that the borrower may request additional meetings,
15 which the lender must schedule within fourteen days, and the
16 lender must provide the borrower with the toll-free telephone
17 number for the United States Department of Housing and Urban
18 Development (HUD) to find a HUD-certified housing counseling
19 agency. Cal. Civ. Code § 2923.5(a)(2). "If section 2923.5 is not
20 complied with, then there is no valid notice of default, and
21 without a valid notice of default, a foreclosure sale cannot
22 proceed." Id. at 223. The remedy for a failure to comply with
23 section 2923.5 is "to postpone the sale until there has been
24 compliance with" the statute. Id. (citing Cal. Civ. Code
25 § 2924g(c)(1)(A)).

26 _____
27 ² Alternatively, a lender may comply with section 2923.5 by
28 completing the due diligence requirements of subdivision (g) of
the statute. Mabry, 185 Cal. App. 4th at 221.

1 Plaintiff's declaration and verified complaint are sufficient
2 to demonstrate she is likely to succeed on the merits of her claim
3 under section 2923.5(a)(2). Although Defendants have submitted
4 records documenting some communications between the parties that
5 took place thirty days or more before the recording of the notice
6 of default, these records do not demonstrate that Defendants
7 complied with the requirements of section 2923.5(a)(2).
8 Specifically, these documents do not show that Defendants
9 initiated the requisite telephone calls or in-person meetings.
10 These records also do not support that during these conversations
11 Defendants informed Plaintiff of her right to request a further
12 meeting in person or over the phone, to take place within fourteen
13 days, or of the HUD toll-free telephone number. Defendants cannot
14 meet the obligations of section 2923.5(a)(2) by sending form
15 letters. Mabry, 185 Cal. App. 4th at 209-10.

16 Further, because the Remington Court property is likely to be
17 sold at the foreclosure sale, Plaintiff has demonstrated that she
18 is likely to suffer irreparable harm. The balance of equities
19 tips in Plaintiff's favor because, in the absence of preliminary
20 injunctive relief, she faces the sale of the Remington Court
21 property; in contrast, as explained above, preliminary injunctive
22 relief provided under section 2923.5 will only delay the
23 foreclosure sale to permit compliance with the statute. Finally,
24 the public interest favors vindicating the Legislature's intent
25 "to have individual borrowers and lenders 'assess' and 'explore'
26 alternatives to foreclosure." Mabry, 185 Cal. App. 4th at 223.

27 The Court, however, rejects Plaintiff's argument that no bond
28 at all should be posted. See Fed.R.Civ.P. 65(c) (providing that

1 "[t]he court may issue a preliminary injunction or a temporary
2 restraining order only if the movant gives security in an amount
3 that the court considers proper to pay the costs and damages
4 sustained by any party found to have been wrongfully enjoined or
5 restrained"). Taking into account the circumstances, including
6 but not limited to the fact that over the past two years,
7 Plaintiff has continued living at the real property at issue
8 without making any payments to Defendants, the Court finds that a
9 bond in the amount of \$3,000 per month, the approximate fair
10 rental value of the house and an amount that Plaintiff had
11 previously represented that she could afford to pay, is
12 appropriate.

13 Accordingly, the Court GRANTS Plaintiff's motion for a
14 preliminary injunction on condition that she pay a bond of \$3,000
15 per month, starting on October 20, 2011. The temporary
16 restraining order remains in effect until that date. If proof of
17 payment on the bond is timely provided, a preliminary injunction
18 will be entered as a separate document. The bond condition may be
19 satisfied without a formal bond, by depositing the required
20 amounts in Defendants' attorneys' trust account. The preliminary
21 injunction will be lifted if Plaintiff discontinues payment on the
22 bond.

23 IT IS SO ORDERED.

24 Dated: 10/18/2011


CLAUDIA WILKEN
United States District Judge